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ABSTRACT

This paper explains how upcoming U.S. Supreme Court decisions in Gratz v. Bollinger and Grutter v. Bollinger are expected to broadly affect the future of race-conscious affirmative action. In these cases, the Supreme Court addresses the constitutionality of admissions policies at the University of Michigan designed to promote educational diversity in the undergraduate college and law school. The University's policies draw legal support from the U.S. Supreme Court's 1978 ruling in Regents of the University of California v. Bakke, when the Court upheld the use of race as a factor in higher education admissions. This paper discusses the constitutional questions before the Court and recent research findings directly relevant to answering these questions. Part 1 provides information on the Bakke case and the more recent cases challenging the Bakke ruling. Part 2 examines the basic legal and constitutional questions at stake in the University of Michigan cases. Part 3 highlights research findings relevant to the question of whether promoting diversity in higher education is a compelling governmental interest. Part 4 examines research findings regarding the "narrow tailoring" requirement (which evaluates the fit between a compelling interest and the policy adopted to advance that interest), including the effectiveness of race-conscious and race-neutral policies. (Contains 98 footnotes.) (SM)

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Revisiting *Bakke* and Diversity-Based Admissions: Constitutional Law, Social Science Research, and the University of Michigan Affirmative Action Cases

Briefing Paper

By Angelo N. Ancheta

March 2003

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Revisiting *Bakke* and Diversity-Based Admissions: Constitutional Law, Social Science Research, and the University of Michigan Affirmative Action Cases

Angelo N. Ancheta[1]

Introduction

The upcoming decisions of the United States Supreme Court in two major cases—*Gratz v. Bollinger* and *Grutter v. Bollinger*—are expected to have broad effects on the future of race-conscious affirmative action in the United States. In these cases, the Supreme Court will address the constitutionality of admissions policies at the University of Michigan that are designed to promote educational diversity in both the University's undergraduate college and its law school. Hanging in the balance are the admissions policies of dozens of selective colleges and universities—both public and private—as well as the boundaries of race-conscious policy making in areas such as voluntary desegregation in K-12 education; government contracting; and recruitment, hiring, promotion, and layoff practices in private and public sector employment.

Like the admissions policies at many highly selective colleges and universities, the University of Michigan's policies draw legal support from the U.S. Supreme Court's 1978 ruling in *Regents of the University of California v. Bakke*,[2] in which a closely divided Court upheld the use of race as a factor in higher education admissions. The Supreme Court's revisiting of the *Bakke* decision in the University of Michigan cases, designed to reconcile a split among the lower federal courts over the vitality of *Bakke* as a legal precedent, has generated extensive public attention and the participation of scores of individuals and institutions both inside and outside of higher education. Over eighty *amicus curiae* (friend of the court) briefs have been filed in the University of Michigan cases, including briefs from the United States government, several state governments, elected officials, the military, major corporations, leading colleges and universities, civil rights organizations, academic and research associations, advocacy groups, and students from across the country.

The issues in these cases are complex, and the outcomes are far from certain. Colleges and universities have relied on the guidelines established in Justice Powell's opinion in *Bakke* for nearly twenty-five years, but the upcoming rulings in the University of Michigan cases could seriously disrupt the current legal landscape. A majority of the Supreme Court could vote to uphold *Bakke*, to overturn it, to modify it in some way, or to develop entirely

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[2] 438 U.S. 265 (1978).

new standards for evaluating race-conscious admissions policies in higher education. Moreover, in applying its legal standards to the actual policies in question, a Court majority might vote to uphold both the undergraduate and the law school policies, to strike down both sets of policies, or to differentiate the policies and uphold one set and not the other.

This Briefing Paper is designed to clarify several issues at stake in the University of Michigan cases, and focuses on two major areas: (1) the constitutional questions before the Court, and (2) recent research findings that are directly relevant to answering these constitutional questions. The issues of constitutional law revolve around a legal test known as the "strict scrutiny" standard, a rigorous test applied to race-conscious policies in which the courts evaluate both the importance of the underlying goals of an institution's policy and the necessity of the policy in advancing those goals. Research findings focusing on the educational benefits of diversity in higher education and on the effectiveness of race-conscious admissions policies have a direct bearing on the Supreme Court's analysis of whether the University's interest in promoting diversity is, in the language of the law, a "compelling governmental interest" and whether the University's race-conscious admissions policies are "narrowly tailored" to advance that interest.

The Briefing Paper is divided into four parts. Part I provides information on the *Bakke* case and the more recent cases challenging the *Bakke* ruling. Part II examines the basic legal and constitutional questions at stake in the University of Michigan cases. Part III highlights research findings relevant to the question of whether promoting diversity in higher education is a "compelling governmental interest." Part IV examines research findings addressing the "narrow tailoring" requirement, including the effectiveness of race-conscious and race-neutral admissions policies.

I. *Bakke* and the Challenges to Diversity-Based Admissions Policies

A. *Regents of the University of California v. Bakke*

1. The Diversity Rationale

The recent court challenges to race-conscious admissions policies in higher education revolve around whether the U.S. Supreme Court's 1978 ruling in *Regents of the University of California v. Bakke* remains good law. In *Bakke,* a fragmented Supreme Court struck down the race-conscious special admissions policy employed at the medical school of the University of California, Davis, but reversed a lower court's ruling that race could never be considered a factor in higher education admissions. Justice Powell, along with Chief Justice Burger and Justices Rehnquist, Stevens, and Stewart, formed a five-member majority of the Court which found that the medical school's special admissions policy—a plan that set aside 16 out of 100 seats in the entering class for disadvantaged minority applicants—was illegal because it precluded white applicants from competing for those special admissions seats. However, Justice Powell, as part of a different five-member majority that included Justices Brennan,

Marshall, Blackmun, and White, also held that the use of race in a competitive admissions process was constitutionally permissible.

Justice Powell's pivotal opinion stated that a university's interest in promoting diversity within its student body was compelling and that a "properly devised admissions program involving the competitive consideration of race and ethnic origin"[3] would be constitutional. Rooted in academic freedoms arising out of the First Amendment, a university's interest in promoting "educational diversity," according to Justice Powell, encompasses not just racial diversity, but an array of elements, such as geographic diversity, social or economic disadvantage, and work experiences, that can contribute to the overall diversity of the student body and can promote the exchange of ideas central to a university's basic mission. Relying on the undergraduate admissions policy at Harvard College as an example, Justice Powell distinguished an illegal policy such as the UC-Davis medical school plan in which white applicants could not compete for seats in an entering class from policies such as the Harvard plan that employ race as a "plus" factor among many factors considered in a competitive admissions process.

2. Title VI and Applying the Constitution to Private Universities

The *Bakke* case also contains another important, but often less publicized, ruling regarding the legal standards under Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race or national origin by recipients of federal funding. The Court ruled that, when intentional discrimination is involved, institutions bound by Title VI are subject to the same standards mandated under the equal protection clause of the federal constitution. This means that the admissions policies of both state universities and *private* universities that receive federal funding are bound by the same legal requirements—they are subject to "strict scrutiny"—when they take race into account in admissions decisions. Because almost all colleges and universities in the United States receive some form of federal funding, the *Bakke* case and the University of Michigan cases have wide-ranging effects on higher education.

B. Diversity and the University of Michigan Admissions Policies

Selective colleges and universities throughout the country have relied on Justice Powell's *Bakke* opinion as the legal underpinning for their diversity-based admissions policies. The University of Michigan Law School's admissions policy—a "whole-file review" policy—is modeled directly on the Harvard College plan cited by Justice Powell in *Bakke* and employs race as one factor in an individualized review process that also considers numerical criteria such as grades and standardized test scores along with life experiences and personal backgrounds in order to create a diverse student body. An applicant's race may "tip the balance" in an admissions decision, but all applicants compete for the same seats in the entering class.

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[3] *Bakke*, 438 U.S. at 320.

The undergraduate admissions policy at the University of Michigan also relies on the use of race as a "plus" factor, but in two different ways. First, under a point system that allocates a maximum of 150 points to any given application, race is considered along with several other criteria, including grades (counting for up to 80 points), standardized test scores, socioeconomic status, geographic factors, alumni relationships, personal achievement, leadership and service skills, and writing an outstanding essay. Members of underrepresented minority groups receive 20 points under the system, but the same 20 points are also available to individuals from socio-economically disadvantaged backgrounds, graduates of predominantly minority high schools, scholar-athletes, and individuals who bring special qualities identified by the University's Provost.

Second, admissions officers may, after a threshold review, "flag" certain applications to keep an applicant in the pool for further consideration at a later time. Applications from underrepresented minorities can be flagged, but so can applications from those who were at the top of their class; those residing in a preferred county of Michigan; those exhibiting unique life experiences, challenges, interests, or talents; those from a disadvantaged background; and those who are recruited athletes. Flagging an applicant does not, however, separate the applicant from the general applicant pool and all applicants still compete for the same seats in the class. Consistent with Justice Powell's analysis in *Bakke*, the two elements of the undergraduate admissions policy give the University the flexibility to consider "pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight."[4]

C. Court Challenges to *Bakke* and Race-Conscious Admissions Policies

1. Legal Arguments Presented by Plaintiffs

Recent challenges to race-conscious admissions policies, including the policies at the University of Michigan, have been initiated by advocacy groups such as the Center for Individual Rights on behalf of white applicants who have been denied admission to selective colleges and universities employing race in their admissions policies. The legal arguments in these cases have focused on challenging the validity of the *Bakke* decision as a legal precedent and on contending that the interest in promoting diversity is not sufficiently compelling to justify the use of race in admissions.

a. Has *Bakke* Been Overruled?

Plaintiffs have challenged the validity of the *Bakke* decision in a number of ways. First, they have argued that the U.S. Supreme Court's subsequent rulings in affirmative action cases have, in effect, overruled *Bakke*. Plaintiffs point to cases such as *City of Richmond*

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[4] *Bakke*, 438 U.S. at 317.

v. J.A. Croson Co.[5] and *Wygant v. Jackson Board of Education*,[6] where the Supreme Court struck down race-conscious affirmative action policies in government contracting and employment because the particular rationales for the policies (remedying general societal discrimination (*Croson*) and providing role models for minority students (*Wygant*)) were not found to be compelling. In essence, plaintiffs have argued that an institution's interest in remedying the present effects of its own past discrimination—an interest that the Court has recognized as a compelling interest—is now the only permissible interest that can justify a race-conscious policy.

The weakness in this line of argument is that the Supreme Court has never ruled that an interest in remedying the present effects of past discrimination is the only governmental interest that can justify a race-conscious policy. The Court has, as it did in the *Croson* and *Wygant* cases, found that certain types of interests do not qualify as compelling interests, but this is not the same as imposing a blanket prohibition of all interests other than remedying the present effects of past discrimination.

b. Is Justice Powell's Opinion a Binding Precedent?

Another attack on the *Bakke* decision focuses on the precedential value of Justice Powell's opinion, which plaintiffs argue does not represent the view of a full majority of the Supreme Court. While several opinions were written in *Bakke*, section V.C of Justice Powell's opinion did garner the support of four other Justices who voted to uphold the consideration of race in higher education admissions. Section V.C of his opinion states that "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."[7] However, plaintiffs argue that the four Justices who joined Justice Powell in holding that race could be considered in admissions relied on different reasoning to reach the same conclusion, and, therefore, Justice Powell's opinion reflects only his own views and not the views of a majority of the Court.

There are important differences between the opinion of Justice Powell and the opinion of Justice Brennan, who wrote on behalf of the four Justices who voted with Justice Powell to uphold race-conscious admissions. Justice Powell called for the application of strict scrutiny to the medical school's admissions program rather than a lower standard of scrutiny ("intermediate scrutiny") offered by Justice Brennan.[8] In addition, Justice Brennan would have upheld a race-conscious admissions program based on an interest in remedying societal discrimination, a broader rationale that was criticized by Justice Powell as being an "amorphous concept of injury that may be ageless in its reach into the past."[9] Justice Brennan also would have upheld a more heavily weighted use of race—a separate track for

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[5] 488 U.S. 469 (1989).
[6] 476 U.S. 267 (1986).
[7] *Id.* at 320.
[8] *Bakke*, 438 U.S. at 359 (Brennan, J., concurring in part).
[9] *Id.* at 307.

minority applicants in the UC-Davis program—compared to the "plus" factor policy endorsed by Justice Powell.

In an earlier case, *Marks v. United States*, the U.S. Supreme Court established a rule to resolve this type of problem. The Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[10] Plaintiffs have argued that it is impossible under the *Marks* test to find the narrowest grounds of agreement because the opinions of Justice Powell and Justice Brennan were so fundamentally different that there was no point of intersection.

Nevertheless, it can also be argued under the *Marks* test that these differences demonstrate that Justice Powell's opinion is in fact the controlling opinion in *Bakke*. It is precisely because Justice Powell required a higher level of judicial scrutiny and rejected the broader interest in remedying societal discrimination that his opinion should be viewed as the narrowest grounds among the various Justices voting to uphold the use of race in admissions. Similarly, Justice Powell's endorsement of the "plus" factor policy over the two-track admissions policy adopted by the UC Davis medical school can be interpreted as providing a more circumspect and narrower method for employing race in a higher education admissions program.

c. Is Promoting Diversity a Compelling Interest?

In any case, if plaintiffs succeed in convincing a court that Justice Powell's opinion in *Bakke* is not controlling, they further contend that the promotion of diversity is not a compelling governmental interest. Plaintiffs have typically argued that a university's interest in diversity is too vague and ill-defined to be constitutionally compelling; that the diversity rationale relies on stereotypes that link membership in a racial group with particular experiences or perspectives; and that diversity-based admissions operate in practice as a method for remedying societal discrimination, an interest that the Court has already determined is not compelling.

Briefly stated, the counterarguments by universities have stressed the academic freedom of colleges and universities to determine their mission, goals, and the composition of their student bodies, and have focused on the specific and positive benefits of educational diversity, which include enhanced learning environments and improvements in students' learning and thinking. Race continues to be a major determinant of personal experience and background and is thus highly relevant in the admissions process; moreover, promoting educational diversity actually combats stereotyping by preventing tokenism and racial isolation on campus and by encouraging interaction across races. In addition, universities have consistently stated that promoting the educational benefits of diversity is their goal in

[10] 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

adopting race-conscious admissions, not remedying the lingering effects of societal discrimination.

2. Mixed Outcomes in the Lower Courts

The recent challenges to *Bakke* and to various race-conscious admissions policies have led to significantly different outcomes in the lower courts. The trial courts in the two University of Michigan cases themselves produced contradictory opinions: the district court in the law school case struck down the law school's admissions policy by ruling that promoting diversity is not a compelling interest (a decision later reversed by the U.S. Court of Appeals for the Sixth Circuit), and the district court in the undergraduate case upheld the constitutionality of the University's current admissions policies, consistent with *Bakke*.

There have been three general outcomes in the lower courts:

(1) most courts have relied on *Bakke* and Justice Powell's opinion to uphold race-conscious admissions policies that are consistent with *Bakke*;

(2) a few courts have ruled that *Bakke* is not a binding precedent and have gone on to strike down race-conscious policies as unconstitutional; and

(3) one court has assumed that promoting educational diversity is a compelling interest under *Bakke* but struck down a higher education admissions policy because it was not "narrowly tailored" to advance the interest in diversity and thus failed to comply with the second half of the strict scrutiny test.

Rulings that Justice Powell's opinion in the *Bakke* case is still a binding precedent can be found in the decisions of the U.S. Court of Appeals for the Sixth Circuit in *Grutter v. Bollinger* (the University of Michigan Law School case),[11] the U.S. Court of Appeals for the Ninth Circuit in *Smith v. University of Washington Law School*,[12] and the U.S. District Court in *Gratz v. Bollinger* (the University of Michigan undergraduate case),[13] which was taken up by the U.S. Supreme Court before the judgment of the Sixth Circuit could be issued. On the other hand, in *Hopwood v. Texas*,[14] the U.S. Court of Appeals for the Fifth Circuit held in 1996 that *Bakke* was no longer good law and struck down the University of Texas Law School's race-conscious admissions policy as unconstitutional. Adopting a third line of reasoning, the U.S. Court of Appeals for the Eleventh Circuit in *Johnson v. Board of Regents*[15] assumed for the sake of argument that promoting diversity is a compelling interest, but struck down the University of Georgia's race-conscious admissions policy because it was not

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[11] 288 F.3d 732 (6th Cir. 2002).
[12] 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 2192 (2001).
[13] 122 F. Supp. 2d 811 (E.D. Mich. 2000).
[14] 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).
[15] 263 F.3d 1234 (11th Cir. 2001).

narrowly tailored to advance the interest in promoting diversity. (The Eleventh Circuit's test for narrow tailoring is discussed in Part II below.)

Although several of the lower court cases were appealed to the U.S. Supreme Court, the Court declined to take any of the appeals prior to accepting the University of Michigan cases, which have the most thoroughly developed records in the trial courts and lack any significant procedural issues that might prevent the main legal issues from being addressed.

II. Strict Scrutiny and the Constitutional Framework

If a majority of the Supreme Court rules that *Bakke* is still good law and that Justice Powell's opinion is controlling in the University of Michigan cases, the Court's analysis will focus on whether the two admissions policies comply with Justice Powell's guidelines in *Bakke*. However, it is also possible that a majority of the Court will reconsider the basic constitutional questions addressed in *Bakke*.[16] This part of the Briefing Paper examines the basic constitutional framework that the courts employ in reviewing race-conscious policies and provides a backdrop for a later discussion of the research findings that are directly relevant to an analysis of the University of Michigan's admissions policies.

A. Equal Protection and the Strict Scrutiny Standard

The Supreme Court's recent rulings in the affirmative action area have made clear that any public policy that considers race—even if designed to benefit historically disadvantaged minority groups—will be subject to "strict scrutiny," the highest standard of review used by the courts to evaluate the legality of policies under the equal protection clause of the constitution. The standard is so exacting that one legal scholar has characterized strict scrutiny as "strict" in theory but usually "fatal" in fact.[17] This does not mean that all race-conscious policies are unconstitutional; however, the courts are highly likely to strike down a race-conscious policy if it does not serve a very important government purpose and it is not carefully designed to advance that purpose. At the heart of the strict scrutiny analysis in the University of Michigan cases are two basic questions: (1) Is promoting diversity in higher education a "compelling governmental interest" that can justify the use of race in admissions? and (2) If so, is the admissions policy "narrowly tailored" to advance the interest in promoting diversity?

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[16] Although a reconsideration of *Bakke* might appear to violate rules of precedent, the U.S. Supreme Court is free to revisit its prior opinions and to establish new legal standards in the process.

[17] Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972).

1. Compelling Governmental Interests

There is no clear theory to determine when a governmental interest is "compelling," and the U.S. Supreme Court has provided limited guidance on what interests actually constitute compelling interests, having issued rulings in only a handful of cases involving race-conscious affirmative action. In *City of Richmond v. J.A. Croson Co.*[18] the Court ruled that remedying the lingering effects of *societal* discrimination was not a sufficiently compelling interest to justify a race-conscious government contracting policy because it is too broad and amorphous of a goal. For similar reasons, the Court ruled in *Wygant v. Jackson Board of Education,*[19] that trying to remedy societal discrimination by providing role models for minority students was not a sufficiently compelling interest to justify a race-conscious policy involving layoffs of public school teachers.

However, the Court did make clear in the *Croson* case that an institution can have a compelling interest in remedying the present effects of its own past discrimination. For instance, a university that for several years denied admission to African American applicants because of race (its own past discrimination) can have a compelling interest in remedying the absence of African American students in its student body (the present effects of discrimination), and can employ race-conscious measures to address the problem. Even so, the Court has also made clear that an institution seeking to remedy its own past discrimination must offer significant evidence of that past discrimination and its present effects in order to satisfy strict scrutiny; in other words, the institution cannot simply assert an interest, but must demonstrate the need for it. The "strong basis in evidence" rule is designed to ensure that the institution's stated motivation in remedying discrimination is not really a pretext for a more invidious motivation.

One of the fundamental disputes in the University of Michigan cases is whether the Supreme Court's rulings in the *Croson* and *Wygant* cases prohibit *any* race-conscious interests other than remedying the present effects of past discrimination. The U.S. Court of Appeals for the Fifth Circuit in *Hopwood v. Texas* adopted this reasoning in striking down the University of Texas Law School's admissions policy, but no other federal court of appeals has followed this reasoning. Indeed, one court of appeals has explicitly rejected it: "A judge would be unreasonable to conclude that no other consideration except a history of discrimination could ever warrant a discriminatory measure unless every other consideration had been presented to and rejected by him . . . . [T]he rectification of past discrimination is not the only setting in which government officials can lawfully take race into account in making decisions."[20]

There is no clear language in the Supreme Court's decisions to suggest a blanket prohibition on other types of interests, and the lower courts have issued rulings after *Wygant*

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[18] 488 U.S. 469 (1989).

[19] 476 U.S. 267 (1986).

[20] *Wittmer v. Peters,* 87 F.3d 916, 919 (7th Cir. 1996), *cert. denied,* 117 S. Ct. 949 (1997).

and *Croson* that have upheld various non-remedial interests as compelling. For instance, the Ninth Circuit has ruled that promoting research in K-12 education is a compelling interest that can justify a race-conscious admissions policy at a university-based laboratory school studying urban educational problems;[21] similarly, the Seventh Circuit has ruled that a state's interest in effective prisoner control is a compelling interest that can justify a race-conscious hiring policy involving prison guards.[22]

It is not likely that the Supreme Court will adopt a broad approach that would prohibit all potential interests other than remedial interests. Instead, the Court is more likely to focus on the narrower question of whether promoting diversity in higher education is compelling and to leave any questions about other types of non-remedial interests for another day.

Ultimately, deciding whether a given interest is a "compelling" interest under strict scrutiny is a policy judgment that is informed both by legal doctrine and by moral, social, political, and constitutional values.[23] Justice Powell's opinion in *Bakke* articulates many of the values underlying the diversity rationale, such as the academic freedom of colleges and universities to select student bodies consistent with their missions, the benefits of diverse student environments in contributing to the robust exchange of ideas and to the improvement of learning, and the importance of preparing educated individuals for participation and leadership in diverse work environments and professions. Whether a majority of the Court's current members actually share these values regarding the importance of diversity and will agree with Justice Powell's analysis in *Bakke* are among the central questions in the University of Michigan cases.

2. Narrow Tailoring

The narrow tailoring requirement under strict scrutiny is designed to evaluate the "fit" between a compelling interest and the policy adopted to advance that interest. Assuming that the Court upholds the promotion of diversity as a compelling interest, one of the main issues that the Supreme Court must decide in the University of Michigan cases is what specific test for narrow tailoring it will apply to analyze the Michigan admissions policies. If the Court decides that *Bakke* is the applicable precedent, it will apply Justice Powell's criteria. If the Court decides to employ a different test, it may turn to other cases for support, or it may offer a new test altogether.

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[21] *Hunter ex rel. Brandt v. Regents of Univ. of Cal.*, 190 F.3d 1061 (9th Cir. 1999), *cert. denied*, 121 S. Ct. 186 (2000).
[22] *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 949 (1997).
[23] *See* Goodwin Liu, *Affirmative Action In Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 Harv. C.R.-C.L. L. Rev. 381 (1998).

a. *Bakke* and Narrow Tailoring

Justice Powell did not develop a general test for narrow tailoring in *Bakke,* but he did articulate standards for both impermissible and permissible admissions policies designed to promote educational diversity in higher education. In voting to strike down the UC-Davis medical school policy, which set aside a fixed number of seats in the entering class, but endorsing a Harvard College-type plan that uses race as a "plus" factor, Justice Powell offered a set of general principles:

- there must be no rigid quota or a functional equivalent in the form of a set-aside or a predetermined number of seats for minorities
- minority applicants should not be reviewed under a separate admissions track that insulates them from non-minority applicants
- race should be one of several possible plus factors to be considered; other factors may include unique life experiences, challenges, interests or talents, socioeconomic disadvantage, or geography
- each applicant must be treated as an individual rather than a stand-in for a favored group
- no specific racial or ethnic group should be singled out by the program; rather, the program should look to all racial and ethnic groups as contributing to genuine diversity

Applying these standards to the current University of Michigan admissions policies, the lower courts have upheld the Law School's whole-file review system (*Grutter v. Bollinger*), as well as the point system and flagging system employed by the undergraduate college at Michigan (*Gratz v. Bollinger*). Although the plaintiffs in the law school case have asserted that the Law School's use of the term "critical mass" (referring to a minimal number of minority students beyond token numbers) to assess minority admissions amounts to the functional equivalent of a quota, the Sixth Circuit rejected this notion, since the whole-file review system examines files in a highly individualized way and the actual percentages of minority students in each entering class has varied significantly over the past ten years.

In *Gratz,* however, the district court did find unconstitutional a previous undergraduate admissions policy that offered "protected" spaces for minority candidates, as well as for in-state residents, athletes, foreign applicants, and ROTC candidates, during a rolling admissions process. Under that program, a number of protected spaces were reserved in the overall pool of admittees, and spaces were used up as members of a protected group were admitted over the admissions season. The court characterized the protected space as an insulation of minority applicants from competition from non-minorities and as the functional equivalent of a quota. The University contends, however, that the policy never insulated candidates from competitive review and operated as a form of "plus"-factor review; the University has appealed this part of the ruling.

b. *U.S. v. Paradise* and Remedial Tests of Narrow Tailoring

The Supreme Court could also draw on narrow tailoring standards that have been adopted in cases designed to remedy past discrimination. For instance, the courts have often relied on a set of narrow tailoring factors offered by Justice Brennan in *United States v. Paradise*,[24] a U.S. Supreme Court case upholding a court-ordered promotions policy designed to remedy discrimination in public employment. Using the *Paradise* factors, a court examines:

- the necessity for the relief and the efficacy of alternative remedies
- the flexibility and duration of the relief, including the availability of waiver provisions
- the relationship of numerical goals to the relevant market, and
- the impact of the relief on the rights of third parties

The *Paradise* factors may be weighed against each other, and some of the factors may be considered more carefully in a particular case because of the nature of the policy and the strength of the interest. In a non-remedial case involving university admissions, some of the factors might not apply at all. For instance, where the university is not trying to remedy its own past discrimination, the university does not need to adopt numerical goals to make up for the admission of minority students that would have been expected if there had been no discrimination (*Paradise* factor three).

The Court may also draw on narrow tailoring principles from *Wygant* and *Croson,* where the Court raised the need to have a "logical stopping point" for a race-based program to be narrowly tailored. This issue is similar to the second *Paradise* factor above; if the program is narrowly tailored to remedying past discrimination, there must be a clear point at which the program will end. The Court could also draw on principles of overinclusiveness or underinclusiveness that are often used in remedial cases. For example, if the goal of a program is to remedy the present effects of an institution's past discrimination against African Americans, a court may strike down a program that includes other minorities such as Latinos and Asian Americans (groups who may only recently have entered the applicant pool), because the program is overinclusive and not narrowly tailored to remedying the previous discrimination.

c. *Johnson v. Board of Regents*—A Hybrid Test

Because the *Paradise* factors and other remedial factors are not ideally suited to analyzing a non-remedial admissions program based on promoting diversity, the Supreme Court might turn to a test employed in *Johnson v. Board of Regents,* where the U.S. Court of Appeals for the Eleventh Circuit adapted the *Paradise* factors to evaluate the race-conscious admissions policy at the University of Georgia. The Eleventh Circuit assumed that promoting diversity was a compelling interest and examined:

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[24] 480 U.S. 149 (1987).

- whether the policy uses race in a rigid or mechanical way that does not take sufficient account of the different contributions to diversity that individual candidates may offer
- whether the policy fully and fairly takes account of race-neutral factors which may contribute to a diverse student body
- whether the policy gives an arbitrary or disproportionate benefit to members of the favored racial groups, and
- whether the school has genuinely considered, and rejected as inadequate, race-neutral alternatives for creating student body diversity

Applying this test, the Eleventh Circuit ruled that the University of Georgia's policy, which awarded bonus points to minority applicants, was inflexible and failed to give sufficient weight to non-racial admissions factors; the Eleventh Circuit also found that the university had failed to consider any form of non-racial alternative prior to adopting its race-conscious policy.

The *Johnson* test is far from ideal, however. For instance, the *Johnson* test does not specify the meaning of an "arbitrary or disproportionate benefit" for minorities, and it is not at all clear when this element of the test is satisfied. The *Johnson* test also places an overly heavy emphasis on race-neutral factors and alternatives. As a practical matter, a race-neutral policy may not be the only less burdensome alternative available to a university. In *Bakke,* for instance, Justice Powell contrasted a set-aside program that carried a heavy burden on non-minority applicants, who were banned from applying for certain seats, with the less burdensome system that considered race as a "plus" factor. A race-neutral alternative might be the *least* burdensome type of policy, but if it is not an *effective* alternative, it will be of little practical use in promoting diversity.

d. Race-Neutral Alternatives and "Percent Plans"

Regardless of the specific narrow tailoring test adopted by the Supreme Court, it is highly likely that University of Michigan's race-conscious policies will still be weighed against various race-neutral alternatives that have been adopted at other universities. A large amount of attention, as demonstrated by the *amicus curiae* briefs filed by the United States and the State of Florida in support of the University of Michigan plaintiffs, is being drawn to "percent plan" systems—systems guaranteeing admission to a state university for fixed percentage of the highest ranking graduates of every high school in a state. "Percent plans" are used in state universities in Texas, California, and Florida, where race-conscious policies have been prohibited by court decision (the *Hopwood* case in Texas), legislation (Proposition 209 in California), or executive decision (Governor Bush's One Florida Plan).

The relative effectiveness of a "percent plan" is a question that can be measured empirically by comparing admissions and enrollment statistics for different policies. But a more basic question is whether "percent plans" ought to be considered at all as potential

alternatives to race-conscious admissions policies. By design, they are not truly race-neutral because they rely on racial isolation and segregation in the state's K-12 educational system to encourage the admission of minority applicants; states also rely on race-conscious recruitment and assistance to implement the programs. More importantly, though, "percent plans" can only operate at large state-run university systems, and cannot be employed by private universities, small institutions, national institutions, or graduate or professional school programs. The University of Michigan, for instance, is not part of a statewide system, it draws on a national and international pool of applicants, and one out of every three undergraduates is from outside of the state of Michigan. The University of Michigan Law School, a leading national school with an entering class of only a few hundred students, simply cannot implement a "percent plan" system as an admissions system.

B. The Relevance of Social Science Research

As noted above, many of the questions before the Supreme Court can be addressed through empirical inquiries. For instance, research findings can be directly relevant to the Court's narrow tailoring inquiry in the University of Michigan cases: the Court can turn to studies that compare the admissions statistics of students under both race-conscious and race-neutral policies to determine the efficacy of race-neutral alternatives.

Social science research can also be highly relevant in informing the Court's decisions about basic questions of constitutional policy. Indeed, a reliance on social science evidence to inform its constitutional decision making in civil rights cases has a longstanding tradition in the Supreme Court, tracing back to the Court's citation of psychological evidence in *Brown v. Board of Education* to demonstrate the harms associated with segregrated schools.[25]

Whether the promotion of educational diversity is a compelling governmental interest is ultimately a question of law, but the Supreme Court can turn to relevant research findings to assist its decision making on the importance of the diversity rationale. In addition, if the Supreme Court decides to impose an evidentiary requirement similar to the "strong basis in evidence" rule applied in remedial cases (see Part II.A.1 above), a university may be required to show that its true motivation is, in fact, the promotion of diversity and to document its need to promote diversity in admissions. This could mean that the university must provide evidence of the positive benefits of student body diversity and of diverse learning environments on campus.

In defending its admissions policies, the University of Michigan did introduce several expert reports by researchers into the record in the trial courts. The plaintiffs in the litigation did not actually contest many of the expert reports and conceded that there are positive educational benefits associated with diversity, arguing instead that evidence of these benefits is not relevant to the basic legal question of whether promoting diversity is a compelling

[25] 347 U.S. 483, 494 n.11 (1954).

interest. The district court in the undergraduate case (*Gratz*) relied heavily, however, on the research evidence to support its ruling that promoting diversity is a compelling interest.

The evidence introduced at trial is extensive, but the Supreme Court is not limited to examining evidence in the trial record when it is making a rule of law. In other words, if the Court is deciding whether the promotion of diversity is a compelling interest, it can turn to resources and studies outside of the record to inform its policy making. The next two parts of the Briefing Paper examine some of the leading research findings that are relevant to the Supreme Court's constitutional inquiries in the University of Michigan cases.

III. Research Addressing the Compelling Interest in Promoting Diversity

Justice Powell's opinion in *Bakke* relied primarily on the testimony and statements of educators to document a university's compelling interest in promoting diversity in higher education. What has developed since the *Bakke* decision, particularly in the last few years since the *Hopwood* decision, is an extensive and growing body of research addressing the positive benefits of educational diversity. The conclusions in these studies, although not absolutely unanimous,[26] are overwhelmingly consistent and cut across several types of studies, including surveys, longitudinal studies, and experiments. Some of these research findings were introduced into evidence in the trial courts for the University of Michigan cases, while other more recent studies have been published as books, articles in academic journals, and papers presented at leading research conferences. (For citations and additional summaries of the literature, see the footnote below.[27])

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[26] A forthcoming study by Stanley Rothman, Seymour Martin Lipset, and Neil Nevitte, *Does Enrollment Diversity Improve Education?* 15 Int'l J. Pub. Opinion Res. 8 (2003), finds mixed results from surveys of faculty, students, and administrators regarding the positive effects of diversity. The study has been already criticized on several methodological grounds, however, based on, among other things, its focus on variables dealing with student enrollment rather than with student experiences and interactions, and its focus only on black student enrollments as a measure of diversity.

[27] Some of the leading studies and summaries are contained in recently published books, including Diversity Challenged: Evidence on the Impact of Affirmative Action (Gary Orfield with Michal Kurlaender eds. 2001); Compelling Interest: Examining the Evidence on Racial Dynamics in Higher Education (Mitchell Chang, et al. eds., forthcoming 2003); Jeffrey F. Milem & Kenji Hakuta, *The Benefits of Racial and Ethnic Diversity in Higher Education, in* Minorities in Higher Education: Seventeenth Annual Status Report 39 (Deborah J. Wilds ed. 2000); Sylvia Hurtado, et al., Enacting Diverse Learning Environments: Improving the Climate for Racial/Ethnic Diversity in Higher Education (1999). The University of Michigan website also has extensive links to many recently published reports. *See* http:/www.umich.edu/~urel/admissions/research. A number of the *amicus curiae* briefs filed on behalf of the University of Michigan contain extensive citations and summaries of the research literature. Available at the University of Michigan website at http:/www.umich.edu/~urel/admissions/legal/amicus.html, the briefs of the American Educational Research Association, et al.; the American Psychological Association; the American Sociological Association; and the National Education Association (NEA), et al., are particularly useful.

A. Trial Court Evidence: The Gurin Report

1. The Gurin Findings: Positive Learning and Democracy Outcomes

The expert's report produced by Patricia Y. Gurin, a Professor of Psychology and Women's Studies at the University of Michigan, is the most prominent research study introduced in the University of Michigan cases. Professor Gurin analyzed three sources of data in her report: (1) national data collected from over 9,300 students at nearly 200 colleges and universities from the Cooperative Institutional Research Program conducted by the Higher Education Research Institute at UCLA; (2) the Michigan Student Study, containing survey data collected over a number of years from over 1,300 undergraduate students who entered the University of Michigan in 1990; and (3) data drawn from a study of undergraduate students who were enrolled in a class in the Intergroup Relations, Community, and Conflict Program at the University of Michigan.[28] The Gurin Report yielded statistically significant and consistent results across all three analyses of the data, leading Professor Gurin to conclude that "[s]tudents who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills."

Professor Gurin specifically found that "structural diversity"—the racial and ethnic composition of the student body—leads to institutional transformations that provide the opportunity for "classroom diversity"—the incorporation of knowledge about diverse groups into the curriculum (including ethnic studies courses)—as well as "informal interactional diversity"—the opportunity to interact with students from diverse backgrounds in the broad, campus environment. These diversity experiences are in turn linked to several positive learning and democracy outcomes.

One learning outcome is improved, less mechanistic thinking. Professor Gurin found that diversity leads to "a learning environment that fosters conscious, effortful, deep thinking" as opposed to automatic, preconditioned responses.[29] Other outcomes include more active engagement in the learning process and an increased ability to understand the perspectives of others. Students educated in a diverse environment were "most likely to acknowledge that group differences are compatible with the interests of the broader community."[30] Professor Gurin also found that students at the University of Michigan who interacted with diverse peers had "[a]n increased sense of commonality with other ethnic groups," and that these students also exhibited a "growth in mutuality or enjoyment in

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[28] Expert Report of Patricia Y. Gurin, *Gratz v. Bollinger*, No. 97-75231 (E.D. Mich.) & *Grutter v. Bollinger*, No. 97-75928 (E.D. Mich.), *in* The Compelling Need for Diversity in Higher Education 99, 100 (1999), *available at* http:/www.umich.edu/~urel/admissions/legal/expert/gurintoc.html

[29] *Id.* at 105.

[30] *Id.* at 101.

learning about both one's own background and the backgrounds of others, more positive views of conflict, and the perception that diversity is not inevitably divisive in our society."[31]

Additional outcomes involve democratic participation and engagement in society. "Students educated in diverse settings are more motivated and better able to participate in an increasingly heterogeneous and complex democracy," and they "showed the most engagement during college in various forms of citizenship."[32] Students in diverse learning environments "were comfortable and prepared to live and work in a diverse society."[33] Students who reported engaging and interacting with diverse peers felt that "their undergraduate education help[ed] prepare them for their current job."[34]

2. Uncontested Evidence and Attempts to Critique the Gurin Report

The plaintiffs in the *Gratz* and *Grutter* cases did not contest the Gurin Report in the trial courts, but instead argued that any findings showing the positive benefits of diversity were not relevant to the basic legal question of whether promoting diversity is a compelling interest. Although the Gurin Report was introduced in both cases, the district court in *Gratz* relied on the Gurin Report to hold that promoting diversity is a compelling interest, but the district court in *Grutter* basically ignored the report in ruling that promoting diversity is not a compelling interest—although the *Grutter* court did acknowledge that the report documented the positive benefits of diversity.

Because the plaintiffs themselves did not challenge the Gurin Report, other organizations have attempted to refute the report by filing *amicus curiae* briefs in the trial court and the appellate courts, including the Supreme Court. (As a procedural matter, scientific evidence introduced in a trial court should be challenged in the trial court under the rules of expert evidence, so critiques of the evidence outside of trial, particularly by non-parties, can be rejected.) The National Association of Scholars (NAS) and the Center for Equal Opportunity have each filed briefs in the Supreme Court challenging the methodology and conclusions of the Gurin Report, with the NAS brief in the *Gratz* case being almost entirely devoted to a critique of the Gurin Report.[35] The disputes over the Gurin Report have led to published responses by Professor Gurin and independent analyses by researchers at the Stanford Institute for Higher Education Research. [36] *Amicus curiae* briefs by the American Educational Research Association, et al., in the *Grutter* case, and by the American Psychological Association in both cases also contain analyses supporting the Gurin Report.

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[31] *Id.* at 127.
[32] *Id.* at 101.
[33] *Id.* at 127.
[34] *Id.* at 133.
[35] The critiques of the NAS are available at http:/www.nas.org. The critiques of the Center for Equal Opportunity are available at http:/www.ceousa.org.
[36] Professor Gurin's responses are available at http:/www.umich.edu/~urel/admissions/research/gurin.html. The analysis of the Stanford Institute for Higher Education Research is available at http:/siher.stanford.edu.

Although the critiques and defenses are extensive and highly technical, they can be summarized as follows: The primary critique focuses on the methodology of the Gurin Report by arguing that measures of experience with diversity (i.e., "classroom diversity" and "informal interactional diversity") are not the appropriate variables by which to measure effects on educational outcomes such as improved thinking skills; instead, structural diversity (i.e., diversity in the student body) should be examined to show its *direct* impact on those educational outcomes. The defense to this critique is that it mischaracterizes Gurin's study and suggests that student body diversity in isolation must be used to show an impact on educational outcomes; experiences with diversity follow from having a diverse student body in the first place, and experiences with diversity are what actually lead to positive educational outcomes. The independent analysis by the Stanford Institute for Higher Education Research supports the Gurin Report, arguing that the NAS critique "flies in the face of a large body of social science research" and that the Gurin Report is scientifically sound.[37] Analyses by leading national academic associations such as the American Educational Research Association and the American Psychological Association in their *amicus curiae* briefs also conclude that the methodology of the Gurin Report complies with widely accepted scientific standards.

B. Research Documenting the Positive Benefits of Diversity

The research literature documenting the positive effects of diversity is extensive and continues to grow as new research is being conducted. The following section highlights some of the recent findings, divided by the types of outcomes and benefits associated with the student body diversity and diverse learning experiences. Studies that range from national surveys to laboratory experiments show that diversity leads to positive educational outcomes, promotes democratic values and civic participation, and better prepares students for an increasingly diverse society.

1. Improved Educational Outcomes

Recent studies show that student body diversity can produce a wide variety of positive educational outcomes, including a greater variety of intellectual opinions among students, richer classroom environments, improved thinking ability, higher self-confidence, and improved interpersonal and leadership skills.

a. Improved Classroom Learning Environments

Studies show that a racially and ethnically diverse student body improves classroom learning environments by providing students the opportunity to share a broader set of opinions, perspectives, and experiences. One recent study, for example, drew on a national sample of nearly 290,000 freshmen at 572 colleges and universities and examined whether

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[37] Ewart A.C. Thomas & Richard J. Shavelson, *Analysis of Report of Wood & Sherman, Addendum to National Association of Scholars Amicus Brief*, at 9, *available at* http://siher. stanford.edu.

campuses with higher proportions of underrepresented racial minority students (excluding schools such as tribal colleges and historically black colleges and universities with majority-minority enrollments) have a broader collection of student viewpoints.[38] Specifically, the study examined students' viewpoints regarding racial inequity and the treatment of criminals—topics chosen because of their likelihood of being raised in classroom discussions. Researchers found that increased proportions of underrepresented minorities led to a greater variety of opinions, with the effect seen across both public and private institutions and in controlling for factors such as school selectivity and size, parents' educational level, hours of work, participation in extracurricular activities, and geographic diversity.

Surveys of students from the law schools at Harvard University and the University of Michigan, as well as from the medical schools at Harvard and the University of California, San Francisco, show that student body diversity has strong positive effects on the classroom environment, with no statistically significant differences across racial groups.[39] In the law school study by Gary Orfield and Dean Whitla, the Gallup Organization surveyed 1,820 law students to determine the effects of student body diversity on learning and other educational outcomes. When asked how diversity had affected the way in which they reflected upon problems and solutions in class, 68% of the Harvard students and 73% of the Michigan students responded that diversity had affected discussions positively. Sixty-three percent of the Harvard students and 66% of the Michigan students reported that racial diversity enhanced the manner in which topics were discussed in the majority of their classes. In addition, almost two-thirds of the law students reported "that most of their classes were better because of diversity." When the law students were asked to compare their homogeneous classes to their diverse classes in three categories—(1) the range of discussion, (2) the level of intellectual challenge, and (3) the seriousness with which alternative views were considered—42% of the students found the diverse classes to be superior in all three respects while only 3% believed the homogeneous classes were superior.

The survey of 639 medical students by Whitla, et al., at Harvard University and the University of California, San Francisco yielded similar results. Ninety-four percent of students indicated that a diverse student body was a positive element of their educational experience. Eighty-four percent of students thought that diversity enhanced classroom discussion, while only 3% thought it detracted from discussion. Eighty-six percent of

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[38] Mitchell J. Chang, et al., *Diversity of Opinions Among Entering College Students: Does Race Matter?* (Oct. 2002) (paper presented at the National Academy of Education Annual Meeting, Toronto, Canada), *available at* http://www.gseis.ucla.edu/faculty/chang/viewpoints.pdf.

[39] *See* Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools, in* Diversity Challenged: Evidence on the Impact of Affirmative Action 143 (Gary Orfield with Michal Kurlaender eds. 2001) [hereinafter Orfield & Whitla Law School Study]; Dean K. Whitla, et al., *Educational Benefits of Diversity in Medical School: A Survey of Students,* 78 Acad. Med. (forthcoming 2003) (manuscript on file with authors and with The Civil Rights Project, Harvard University) [hereinafter Whitla, et al., Medical School Study].

students thought that classroom diversity was more likely to foster serious discussions of alternative viewpoints.

Studies of law school alumni support underscore the student body surveys finding that student body diversity yields positive benefits. Over 2,000 alumni (over half of whom were minority alumni) who graduated between 1970 and 1996 from the University of Michigan Law School were surveyed on a wide variety of topics, including their views on their legal education and their professional careers.[40] Among its many findings, the study found that large proportions of Michigan alumni placed considerable value on the contributions of diversity to their classroom experiences in law school. Two thirds of the minority alumni from all three decades, and 50% of the white alumni from the 1990s, the period with the highest levels of diversity, placed considerable value on the contributions of racial and ethnic diversity to their law school experiences.

Surveys of faculty members also indicate that greater student body diversity leads to improved classroom learning. For example, a nationwide survey of faculty at major research universities found that a high percentage of respondents agreed that classroom diversity broadened the range of perspectives shared in classes; specifically, more than two-thirds of respondents indicated that students benefit from learning in a racially and ethnically diverse environment with respect to exposure to new perspectives and willingness to examine their own personal perspectives.[41] In a study of the faculty at Macalester College, a liberal arts college in St. Paul, Minnesota, 91% of the faculty agreed that "racial-ethnic diversity in the classroom 'allows for a broader variety of experiences to be shared.'"[42] Eighty percent of the faculty felt that minority students typically raise issues not normally raised by non-minority students, and 75% of faculty agreed that racial and ethnic issues are discussed more substantively in diverse classroom environments.

Surveys of law school faculty members also support the proposition that greater student body diversity improves classroom learning. Analyses of a national survey of over 500 law school faculty members conducted by the American Association of Law Schools (AALS) in 1999 found support among the faculty for student body diversity and for the positive effects of diversity in the classroom.[43] Nearly three-fourths of the law school faculty felt strongly that having a diverse student body is important to the mission of their law

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[40] David L. Chambers, Richard O. Lempert & Terry K. Adams, *Michigan's Minority Graduates in Practice: The River Runs Through Law School,* 25 Law & Soc. Inquiry 395 (2000).

[41] Geoffrey Maruyama & José F. Moreno, *University Faculty Views About the Value of Diversity on Campus and in the Classroom, in* American Council on Education & American Association of University Professors, Does Diversity Make a Difference? Three Research Studies on Diversity in College Classrooms 9, 14-16 (2000).

[42] Roxanne Harvey Gudeman, *Faculty Experience with Diversity: A Case Study of Macalester College, in* Diversity Challenged: Evidence on the Impact of Affirmative Action 251, 258 (Gary Orfield with Michal Kurlaender eds. 2001).

[43] Richard A. White, *Preliminary Report: Law School Faculty Views on Diversity in the Classroom and the Law School Community* (May 2000), *available at* http://www.aals.org/statistics/diverse3.pdf; José F. Moreno, Affirmative Actions: The Educational Influence of Racial/Ethnic Diversity on Law School Faculty (2000) (unpublished Ed.D. dissertation, Harvard University).

schools. Strong majorities of faculty felt that diversity broadens the variety of experiences shared in the classroom, and that diverse interaction exposes students to different perspectives. Majorities also felt that having a critical mass of students of a particular racial or ethnic group is important to their participation in the classroom, and that minority students raise issues and perspectives that are not raised by others.

b. Improved Thinking Skills

Research also indicates that students learn more and think more actively when educated in a racially and ethnically diverse learning environment. In her expert report, Professor Gurin states: "Students learn more and think in deeper, more complex ways in a diverse educational environment."[44] Professor Gurin goes on to show that a diverse educational environment, a curriculum which addresses racial issues, and engagement with peers from diverse backgrounds will result in "a learning environment that fosters conscious, effortful, deep thinking" as opposed to automatic, preconditioned responses.[45] As one researcher indicates, a higher level of thinking can be attributed to the range of ideas and perspectives that diverse students bring to a discussion, which, in turn, "challenge students' stereotypes, broaden their perspectives, and stimulate critical thinking."[46]

Studies using research methods involving controlled laboratory experiments with random assignments underscore these basic propositions; experiments are especially powerful because they provide strong evidence of causation. One recent study employed social psychological techniques to measure the degree of complex thinking that resulted from a diverse group interaction, and found positive effects due to the racial composition of the group.[47] For instance, for participants who reported less racially diverse social contacts in their everyday lives, the exposure to racial diversity in the group discussion resulted in more complex thinking, as measured through pre- and post-discussion essays.

Another line of research shows that studying with peers from diverse backgrounds will have a more pronounced effect on self-reported growth in thinking and problem-solving

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[44] Gurin Report, *supra* note 28, at 118.

[45] *Id.* at 105; *see also* George D. Kuh, *What We're Learning About Student Engagement from NSSE,* Change (forthcoming Mar.-Apr. 2003), at 30-31 (data drawn from surveys of 285,000 students show that students are more likely to be involved in active and collaborative learning with more exposure to diversity); Gudeman, *supra* note 42, at 271 (non-minority students tend to read course materials more critically when part of a diverse classroom); Maruyama & Moreno, *supra* note 41, at 16 (substantial numbers in faculty survey agree that diversity is important for developing thinking skills); José F. Moreno, Affirmative Actions: The Educational Influence of Racial/Ethnic Diversity on Law School Faculty 92 (2000) (unpublished Ed.D. dissertation, Harvard University) (law school faculty members report that diversity helps students develop thinking skills).

[46] Patricia Marin, *The Educational Possibility of Multi-Racial/Multi-Ethnic College Classrooms, in* American Council on Education & American Association of University Professors, Does Diversity Make a Difference? Three Research Studies on Diversity in College Classrooms 61, 69 (2000).

[47] Anthony Lising Antonio, et al., *Effects of Racial Diversity on Complex Thinking in College Students* (2003), *available at* http://siher.stanford.edu.

skills, even more than a curriculum that emphasizes diverse perspectives.[48] Drawing on longitudinal data from a nationwide sample of over 4,200 students, this research indicates that the curriculum cannot replace or replicate the positive effects that student diversity will have on students' thinking skills.

c. Positive Effects on Retention, Satisfaction, Self-Confidence, and Interpersonal and Leadership Skills

Research also shows that socializing across racial lines and engaging in discussions about race with diverse peers has positive effects on a variety of educational outcomes that go beyond cognitive abilities and skills. For example, relying on a national longitudinal database containing data from student surveys, one researcher found that increased diversity in the student body had a positive effect on the individual student's likelihood of both socializing with someone of a different racial group and discussing racial issues, which in turn were shown to have significant positive effects on students' intellectual and social self-concept, college satisfaction, and chances of graduating in four years.[49] Related research has found that interaction among diverse students leads to improved interpersonal skills and leadership skills.[50]

2. Promoting Democratic Values and Civic Engagement.

a. Challenging Students to Develop Alternative Viewpoints and Tolerance for Differences.

Recent studies show that diverse learning environments allow students to encounter and consider different perspectives, ultimately leading to a deeper understanding, respect, and tolerance for individual differences. The Gurin Report, for example, indicates that students with the most experience with diversity on their campuses were "most likely to acknowledge that group differences are compatible with the interests of the broader community."[51]

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[48] Sylvia Hurtado, *Linking Diversity and Educational Purpose: How Diversity Impacts the Classroom Environment and Student Development, in* Diversity Challenged: Evidence on the Impact of Affirmative Action 187, 198 (Gary Orfield with Michal Kurlaender eds. 2001) [hereinafter Hurtado, Linking Diversity and Educational Purpose].

[49] Mitchell J. Chang, *Does Racial Diversity Matter?: The Educational Impact of a Racially Diverse Undergraduate Population,* 40 J. College Student Dev. 391 (1999); *see also* Kuh, *supra* note 45, at 30-31 (data drawn from nationwide surveys of 285,000 students show that students are more likely to be satisfied with college experience with more exposure to diversity); Alexander W. Astin, *Diversity and Multiculturalism on the Campus: How Are Students Affected?* Change, Mar.-Apr. 1993, at 44, 47 (socializing across racial lines has positive effects on students' academic achievement).

[50] Anthony Lising Antonio, *The Role of Interracial Interaction in the Development of Leadership Skills and Cultural Knowledge and Understanding,* 42 Res. Higher Educ. 593 (2001); *see also* Maruyama & Moreno, *supra* note 41, at 15-16 (substantial numbers in faculty survey agree that diversity is important for developing leadership skills).

[51] Gurin Report, *supra* note 28, at 101.

Additional studies have found that socializing across racial lines has positive effects on students' cultural awareness and commitment to racial understanding. A study of undergraduates enrolled in the early 1990s found that studying with someone from a different racial or ethnic background resulted in a positive growth in civic outcomes such as "the acceptance of people of different races/cultures, cultural awareness, tolerance of people with different beliefs, and leadership abilities."[52] Specific research on friendship groups developed among students on campuses with diverse student bodies reinforces the notion that diversity can provide students with the opportunity to develop close friendships with individuals of different races and ethnicities. These interracial friendships consequently become the norm for more general interracial interaction, thus promoting greater racial understanding and awareness.[53]

A recent study, relying on methods that parallel controlled laboratory experiments, compared the attitudes of white students who had been randomly assigned minority roommates with the attitudes of white students who had been randomly assigned white roommates at a public university and found significant effects resulting from the differences in roommates.[54] For instance, students with minority roommates in the first year of college were more likely to express positive attitudes regarding affirmative action policies than their counterparts with white roommates. Students with minority roommates were also more likely to report greater comfort and personal contact with members of other racial and ethnic groups.

Research also indicates that when confronted with new ideas and perspectives in diverse learning environments, students' views and values can be altered. When law students in the Orfield and Whitla study were asked whether conflicts due to racial differences challenged them to rethink their values, most students responded affirmatively.[55] Sixty-eight percent of the Harvard law students and 75% of the University of Michigan law students answered that such conflicts either enhanced or moderately enhanced a rethinking of their values. In addition, 52% of the Harvard students and 60% of the Michigan students reported that conflicts due to racial differences "ultimately [became] positive learning experiences." The Whitla, et al., medical school survey yielded similar findings. Seventy-seven percent of medical students found that they felt challenged to rethink their values when racial conflicts occurred, and 68% thought such occurrences were learning experiences.[56]

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[52] Hurtado, Linking Diversity and Educational Purpose, *supra* note 48, at 198.

[53] Anthony Lising Antonio, *Diversity and the Influence of Friendship Groups in College*, 25 Rev. Higher Educ. 63 (2001).

[54] Greg J. Duncan, et al., *Empathy or Antipathy? The Consequences of Racially and Socially Diverse Peers on Attitudes and Behaviors, available at* http://www.jcpr.org/wp/WPprofile.cfm?ID= 384.

[55] Orfield & Whitla Law School Study, *supra* note 39, at 162.

[56] Whitla, et al., Medical School Study, *supra* note 39 (manuscript at 11).

b. Promoting Participation in Civic Activities

Studies also indicate that students who are educated in a diverse environment are more likely to participate in civic activities. Professor Gurin, for example, concluded in her expert report that "[s]tudents educated in diverse settings are more motivated and better able to participate in an increasingly heterogeneous and complex democracy," and that they "showed the most engagement during college in various forms of citizenship."[57] William G. Bowen and Derek Bok, as documented in their book, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions,* found similar results when they conducted a longitudinal study of students graduating from selective colleges and universities that had used affirmative action in their admissions practices.[58] Drawing from records of more than 80,000 students who matriculated at twenty-eight selective colleges and universities in 1951, 1976, and 1989, the Bowen and Bok study found that the 1976 cohort participated in civic activities in very large numbers: in 1995, nearly 90 percent of the cohort participated in one or more civic activity, a figure that exceeded the participation rate for a control group composed of individuals in the same age range. Bowen and Bok also documented the propensity of students who attended colleges with diverse student bodies to engage in political activity after graduating from college. The study found, for instance, that 93% of the 1976 cohort voted in the 1992 presidential election, a figure that exceeded the control group figure.

3. Preparing Students for a Diverse Society and Workforce

Studies further show that the benefits of diverse learning environments better prepare students for an increasingly diverse society and workforce. Work-related skills are especially important, since, as one study states, "[t]o be competitive, in terms of entry-level employment as well as advancement into positions of responsibility and leadership, students must acquire the understandings and the skills necessary for working productively and harmoniously with fellow workers and citizens who bring widely differing backgrounds and experiences to the workplace and to their communities."[59]

One of the Gurin Report's basic findings was that students in diverse learning environments "were comfortable and prepared to live and work in a diverse society."[60] Professor Gurin found that students who attended diverse classes reported feeling the most prepared for graduate school. In addition, Professor Gurin found that diverse experiences during college positively affected the extent to which white graduates in the national study were living racially or ethnically integrated lives in the post-college world. Students who had

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[57] Gurin Report, *supra* note 28, at 101.

[58] William G. Bowen & Derek Bok, The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions vi (1998).

[59] Jack Meacham, et al., *Student Diversity in Classes and Educational Outcomes: Student and Faculty Perceptions* 20 (1999) (paper presented at American Council on Education's Symposium on Diversity and Affirmative Action).

[60] Gurin Report, *supra* note 28, at 127.

taken the most diversity courses and who had interacted the most with diverse peers during college had the most cross-racial interactions five years after leaving college.

The students in the Orfield and Whitla law school study reported that diversity had affected their "ability to work more effectively and/or get along better with members of other races."[61] Sixty-eight percent of the Harvard law students responded that diversity either "clearly enhanced" or produced a "moderate enhancement" in their ability to work and get along with members of other races. Forty-eight percent of the Michigan law students perceived a clear, positive impact on their ability to work and get along with members of diverse backgrounds. Seventy-six percent of students in the Whitla, et al., medical school survey felt that a diverse student body helped them work more effectively with those of diverse racial backgrounds, and 77% indicated that a greater understanding of medical conditions and treatments was more likely when a student body was diverse.[62]

Students in the Bowen and Bok study were asked what difference their college experience made in "developing [their] ability to work with, and get along with, people of different races and cultures."[63] Forty-six percent of the white respondents in the 1976 cohort "believe[d] that their undergraduate experience was of considerable value in this regard," and 18 percent assigned the highest rating, saying it helped "a great deal." Fifty-seven percent of black respondents in the 1976 cohort "gave college credit for helping them develop these 'getting along' skills." Respondents in the 1989 cohort reported even larger positive effects: 63% of whites and 70% of blacks attributed their ability to work with and get along with people of different races and cultures to their college experiences.

A related study found that students credited their improved job-related skills primarily to their ability to study frequently with diverse peers.[64] Students reported "growth of important skills related to a diverse work force, including their ability to work cooperatively with others." The study concluded that interacting with diverse peers "has the substantial positive effect of the development of skills needed to function in an increasingly diverse society. . . ."

4. Comparable K-12 Educational Benefits

Studies of racially integrated learning environments in the K-12 educational system underscore the findings of studies showing the positive benefits of diversity in higher education.[65] Findings in this area are relevant not only because of the parallels between the systems, but because research shows that students' *sustained* exposure to integrated learning

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[61] Orfield & Whitla Law School Study, *supra* note 39, at 159.

[62] Whitla, et al., Medical School Study, *supra* note 39 (manuscript at 10).

[63] Bowen & Bok, *supra* note 58, at 225.

[64] *See* Hurtado, Linking Diversity and Educational Purpose, *supra* note 48, at 198.

[65] An extensive survey of the applicable literature in this area is available in the Brief *Amicus Curiae* of the National Education Association, *et al.*, in Support of Respondents, *Gratz v. Bollinger* (02-516) & *Grutter v. Bollinger* (02-241), *available at* http:/www.umich.edu/~urel/admissions/legal/amicus.html.

environments leads to greater racial interaction as adults.[66] Studies show that minority students who attend more integrated schools have increased academic achievement and higher test scores.[67] Studies also find that desegregated experiences for African American students will lead to increased interaction with members of other racial groups in later years.[68]

Recent surveys on the attitudes of high school students toward their peers of other racial groups indicate that students of all racial and ethnic groups who attend more diverse schools have higher comfort levels with members from racial groups other than their own, have an increased sense of civic engagement, and have a greater desire to live and work in multiracial settings.[69] For example, in the survey of students in the Jefferson County School District in Louisville, Kentucky, which is one of the nation's most racially integrated school districts because of court-ordered desegregation, 85% of students reported that they were prepared to work in a diverse job setting and would be prepared to do so in the future, while over 80% of African American students and white students reported that their school experience had helped them to work more effectively with and get along with members of other races and ethnic groups.[70] Over 90% of high school students surveyed in Cambridge, Massachusetts, a demographically diverse city with a single public high school, reported that they were prepared to live and work among people of diverse racial and ethnic backgrounds, while 84% percent of both African American students and white students said their school experiences had helped them better understand members from different racial and ethnic groups.[71]

IV. Research Addressing the Narrow Tailoring Requirement

In addition to addressing the compelling interest in promoting educational diversity, research studies can also inform the Supreme Court's analysis of the narrow tailoring

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[66] *See, e.g.*, Janet Ward Schofield, *Maximizing the Benefits of Student Diversity: Lessons from School Desegregation Research, in* Diversity Challenged: Evidence on the Impact of Affirmative Action 99 (Gary Orfield with Michal Kurlaender eds. 2001); Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 Rev. Educ. Res. 531 (1994).

[67] *See* Robert L. Crain & Rita E. Mahard, *The Effect of Research Methodology on Desegregation Achievement Studies: A Meta-Analysis*, 88 Am. J. Soc. 839 (1983); Robert L. Crain, *School Integration and the Academic Achievement of Negroes*, 44 Soc. Educ. 1 (1971).

[68] *See, e.g.*, Wells & Crain, *supra* note 66 (review of twenty-one studies applying "perpetuation theory" that minority students exposed to sustained desegregated experience will lead more integrated lives as adults).

[69] *See* Michal Kurlaender & John T. Yun, *Is Diversity a Compelling Educational Interest?: Evidence from Louisville, in* Diversity Challenged: Evidence on the Impact of Affirmative Action 111 (Gary Orfield with Michal Kurlaender eds. 2001) [hereinafter Kurlaender & Yun, Louisville Survey]; Michal Kurlaender & John T. Yun, *The Impact of Racial and Ethnic Diversity on Educational Outcomes: Cambridge, MA School District, available at* http://www.civilrightsproject.harvard.edu/research/diversity/cambridge_diversity.php#fullreport [hereinafter Kurlaender & Yun, Cambridge Survey].

[70] Kurlaender & Yun, Louisville Survey, *supra* note 69, at 130.

[71] Kurlaender & Yun, Cambridge Survey, *supra* note 69, at 6-8.

requirement under the strict scrutiny test. Research studies are particularly useful in comparing the effectiveness of race-conscious admissions policies and race-neutral policies, including "percent plans" and policies based on socioeconomic status. Research studies are also relevant to specific issues involved in the University of Michigan Law School case, where plaintiffs have challenged the concept of "critical mass," a concept used to address tokenism in the Law School's student body.

A. The Relative Effectiveness of Race-Neutral Policies

1. Studies of Undergraduate Admissions Policies

Several recent studies indicate that race-neutral admissions policies—in particular, policies focusing on class or economic disadvantage—are not as effective as race-conscious admissions policies in promoting educational diversity. For instance, a study by Thomas J. Kane employing data drawn from a sample of students from over 1,000 public and private high schools compared outcomes from statistical analyses of race-conscious and race-neutral admissions policies and found that the "idea that nonracial criteria could substitute for race-based policies is simply an illusion."[72] Comparing class-based policies with race-based policies, the Kane study found that a selective college drawing from the top ten percent of a test score distribution would have to admit *six times* as many students under a class-based policy in order to admit the same number of minority students under a race-based policy. Employing another statistical model, the Kane study found that in order to obtain a comparable level of diversity, a class-based policy would have to assign disadvantages to applicants based on higher income levels and parents' educational level, and would even have to assign a *negative* value to SAT scores for some applicants. Results were even more extreme when the statistical model assigned greater weight to test scores and grades.

Another study employed a model of the University of California admissions process and actual standardized test scores to examine the effectiveness of admissions policies focusing on disadvantaged background, as measured by factors such as income, parent's education, high school graduation rate, percent of students on free school lunch programs, and school location.[73] The study found that even the largest effects of these factors did not substantially increase the diversity of the admitted pool of applicants compared to a model that considered only grade point average and test scores—a model in which racial minorities were already underrepresented relative to a race-conscious policy.

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[72] Thomas J. Kane, *Misconceptions in the Debate Over Affirmative Action in College Admissions, in* Chilling Admissions: The Affirmative Action Crisis and the Search for Alternatives 17, 28 (Gary Orfield & Edward Miller eds., 1998); *see also* Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions, in* The Black-White Test Score Gap 431 (Christopher Jencks & Meredith Phillips eds., 1998) (parallel analyses of race-conscious and race-neutral admissions policies).

[73] Daniel Koretz, et al., *Testing and Diversity in Postsecondary Education: The Case of California,* 10 Educ. Pol'y Analysis Archives (2002), *available at* http://epaa.asu.edu/epaa/v10n1.

A similar study relied on data from seven public universities in Texas and test score data to examine, among other things, the effectiveness of race-neutral admissions policies based solely on SAT and class rank and the effectiveness of policies that gave preference to various non-racial admissions criteria, including high school location, parents' education, percent of the high school that was economically disadvantaged, percent of the high school that was mobile, and socioeconomic status.[74] The study found that race-neutral admissions policies relying on test scores and class rank have the greatest effect of reducing African American and Latino representation at the most selective institutions in Texas. The study also found that while consideration of criteria based on economic disadvantage can result in a small boost in minority representation at the most selective institutions, minority representation did not reach the levels that would be expected under a race-conscious admissions policy.

2. Studies of Law School Admissions Policies

Studies focusing on law school admissions further demonstrate that race-neutral policies are ineffective alternatives to race-conscious policies. In an extensive analysis of data from all students who applied to American Bar Association-approved law schools in 1990-91 and from all Fall 1991 first-year law students at 163 ABA-approved schools, a study by Linda F. Wightman examined the likely effects of a race-neutral admissions policy that relied solely on undergraduate grades and LSAT scores, as well as policies that employed various race-neutral factors, such as socioeconomic status.[75] The Wightman study found that a "numbers only" policy would lead to a sharp decline in the number of minority applicants who were admitted to *any* law school, not just the ones to which they had applied. Among 3,435 black applicants who were accepted to at least one law school to which they applied, only 687 would have been accepted if a grade-test score model had been the sole basis for admissions. The Wightman study also found that none of the models employing race-neutral factors, including socioeconomic status, were as effective as race-conscious admissions policies.

Race-neutral admissions policies have been found to be ineffective at law schools in states that previously allowed race-conscious policies. For instance, in a study focusing on the law schools at the University of California, Berkeley (Boalt Hall) and UCLA, the researcher found that a "discretionary" system employed at Boalt Hall in the late 1990s that attempted to employ race-neutral factors for students in the upper-middle range of grades and test scores still had the effect of screening out minority applicants who fell at the lower

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[74] Catherine L. Horn, Diversity in a Race-Neutral Setting: An Empirical Analysis of the Potential Effectiveness of Alternative Selection Criteria in Creating Racially/Ethnically Diverse Student Bodies at Texas Public Universities (2001) (unpublished Ph.D. dissertation, Boston College) (on file with author and with The Civil Rights Project, Harvard University).

[75] Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 N.Y.U.L. Rev. 1 (1997).

range of grades and test scores.[76] At UCLA, where the administration implemented a class-based formula for achieving diversity among admitted students that combined LSAT, undergraduate GPA, and socioeconomic disadvantage, the study found that minority enrollments still fell far below the levels attained under race-conscious admissions, and there was even a gradual decline in the enrollments of underrepresented minorities in the first years of the class-based admissions policy. The study concludes that "in the absence of race conscious decision making, there is no efficient alternative for maintaining prior levels of racial and ethnic diversity at selective institutions."

3. Studies Analyzing Admissions Data in States with Race-Neutral Policies

a. Declines in Undergraduate Admissions

Analyses of undergraduate admissions data from public universities in states that have changed from race-conscious to race-neutral policies because of legal prohibitions on race-conscious measures also show the relative ineffectiveness of race-neutral policies. In Texas, the two most selective institutions—the University of Texas at Austin and Texas Agricultural and Mechanical University (Texas A&M)—have seen declines in the undergraduate admissions of racial minority students after 1996, following the Fifth Circuit's decision in *Hopwood v. Texas*.[77] At the University of Texas at Austin, 5% of the admitted undergraduate students in 1996 were African American and 14% were Latino; the following year, only 3% were African American and 13% were Latino. By 2001, African Americans were 3.5% of the admitted classes, and Latinos were 14.7%. One study has estimated that at Texas A&M, which does not release its data publicly, an average of 4.7% of the admitted classes between 1992 and 1996 were African American, but only 2.8% of the admitted class in 1998 and only 3.5% of the admitted class in 2001 were African American; for Latinos, the figures are 14.7% for the classes between 1992 and 1996, dropping to only 9.5% in 1998 and rising to only 11.6% in 2001.[78] The lack of growth in Latino admittees at both universities is particularly stark because of the growing population of Latinos in Texas that is becoming a larger share of the state's overall population: in 1990, one-third of the 15-to-19-year-old population in Texas was Latino; by 2000, nearly 40% of that age group was Latino.[79]

In California, undergraduate admissions at the University of California's most selective institutions, Berkeley and UCLA, saw similar declines following the enactment of Proposition 209, the state ballot initiative prohibiting race-conscious admissions in the

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[76] Helen H. Hyun, The End of Race: Maintaining Diversity at U.C. Law Schools in a Post-Affirmative Action Era 110-11 (2000) (unpublished Ed.D. dissertation, Harvard University).

[77] *See* Catherine L. Horn & Stella Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* 38-39 (2003), *available at* http://www.civilrightsproject.harvard.edu.

[78] Marta Tienda, et al., *Closing the Gap?: Admissions and Enrollments at the Texas Public Flagships Before and After Affirmative Action* 49, *available at* http://www.texastop10.princeton.edu.

[79] Horn & Flores, *supra* note 77, at 26.

state.[80] At the University of California, Berkeley, 7.3% of the freshman admittees in 1995 were African American and 18.5% were Latino; in 1998, only 3.2% were African American and 8.5% were Latino; by 2001, numbers had increased somewhat, but only 4.1% were African American and 12.5% were Latino. At UCLA, 6.7% of the freshman admittees in 1995 were African American, and 20.1% were Latino; in 1998, only 3.0% were African American, and 10.1% were Latino; in 2001, numbers had increased slightly, but only 3.3% were African American and 12.7% were Latino. Like Texas, California has a large and growing Latino population that is becoming a larger share of the state's overall population: in 1990, 35% of the 15-to-19-year-old population in California was Latino; by 2000, 39% of that age group was Latino.[81]

b. Declines in Law School Enrollment

Analyses of law school admissions data in state law schools where race-conscious admissions policies have been eliminated also show the relative ineffectiveness of race-neutral policies.[82] According to analyses of recent enrollment data from the selective public law schools in Texas, California, and Washington, where race-conscious admissions have been prohibited for at least three years, there have been steep declines in minority enrollments under race-neutral admissions policies.[83] From 1993-96, when race-conscious admissions were in place, African Americans were, on average, 6.2% of the first-year law students enrolled at the University of Texas; from 1997-2001, when race-neutral admissions were in place, African Americans were only 2.2% of the first-year students.[84] For the same years, similar declines in African American enrollments occurred at the University of California, Berkeley (Boalt Hall) and UCLA: Boalt Hall enrollments dropped from 8.7% to 2.7%; UCLA enrollments declined from 8.4% to 2.3%. At the University of Washington, where policies were changed from race-conscious to race-neutral in 1999 following the passage of Initiative 200, African American first-year enrollments declined from an average of 3.3% in 1996-98 to an average of 1.2% in 1999-2001.

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[80] *See* Horn & Flores, *supra* note 77, at 39-40.

[81] Horn & Flores, *supra* note 77, at 26.

[82] *See, e.g.*, William C. Kidder, The Struggle for Access from Sweatt to Grutter: A History of African American, Latino, and American Indian Law School Admissions, 1950-2000, 19 Harv. BlackLetter L.J. (manuscript at 34-43) (forthcoming 2003), available at http://www.law.harvard.edu/studorgs/blj/articles.html; Jorge Chapa & Vincent A. Lazaro, Hopwood *in Texas: The Untimely End of Affirmative Action, in* Chilling Admissions: The Affirmative Action Crisis and the Search for Alternatives 55, 62-68 (Gary Orfield & Edward Miller eds. 1998); Jerome Karabel, *No Alternative: The Effects of Color-Blind Admissions in California, in* Chilling Admissions: The Affirmative Action Crisis and the Search for Alternatives 33, 43-45 (Gary Orfield & Edward Miller eds. 1998).

[83] *See* Kidder, *supra* note 81 (manuscript at 34-43).

[84] Data on African American enrollments for the University of Texas are especially striking when placed in historical context. In 1951, the six African American entrants to the first post-segregation class at University of Texas Law School constituted 2.1% of the enrolled students. Thomas D. Russell, *The Shape of the Michigan River as Viewed from the Land of* Sweatt v. Painter *and* Hopwood, 25 Law & Soc. Inquiry 507, 507 (2000). During 1997-2001, African Americans were a nearly identical proportion of the first-year enrollments at the University of Texas: 2.2%. *See* Kidder, *supra* note 81(manuscript at 38-39).

The declines in Latino first-year law school enrollments are comparable. From 1993-96, Latinos were, on average, 11.1% of the first-year law students enrolled at the University of Texas; from 1997-2001, they were only 8.3% of the first-year students. For the same periods, Boalt Hall Latino first-year enrollments dropped from 13.2% to 6.4%; UCLA Latino first-year enrollments dropped from 14.4% to 8.2%. At the University of Washington, Latino first-year enrollments declined from an average of 6.3% in 1996-98 to 4.6% in 1999-2001.

Tokenism at some of the major state law schools becomes especially apparent when one considers the actual number of students enrolled, rather than percentages. For example, at Boalt Hall, only 1 out of 268 first-year students entering in 1997 was African American; at UCLA only 3 out of 289 first-year students in 1998 were African American; at the University of Washington, only 2 out of 158 students in 1999 were African American, and only 1 out of 163 students in 2000 was African American.[85]

B. The Relative Effectiveness of "Percent Plans"

Although "percent plan" admissions policies vary significantly from state to state, and the data are far from complete, recent analyses of these policies indicate that they are much less effective than race-conscious policies in promoting educational diversity.[86] As noted in Part II.A.2 above, percent plan policies are implemented only at the undergraduate level at large state universities, and cannot be readily applied to other types of institutions, including private institutions, national institutions, and graduate and professional school programs. Recent studies also indicate that percent plan policies may have only limited practical effect because many of the students admitted under the plans would have likely qualified for admission to the state university system anyway, even if a percent plan were not in place. For example, one study has concluded that less than 1% of students admitted in the Florida Talented 20 program needed the percent plan to gain admission to the state system.[87]

Recent studies based on statistical modeling and studies based on empirical analyses of recent admissions data indicate that percent plans are not adequate substitutes for race-conscious policies. For instance, in one study employing statistical models focusing on the University of California, researchers concluded that automatically accepting the top 4% of graduates from each high school in the state would not appreciably affect the proportion of African American or Latino students entering the system.[88] A study relying on similar

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[85] Kidder, *supra* note 81 (manuscript at 41).

[86] *See* Horn & Flores, *supra* note 77; Tienda, et al., *supra* note 78; Patricia Marin & Edgar K. Lee, *Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida* (2003), *available at* http://www.civilrightsproject.harvard.edu; U.S. Comm'n on Civil Rights, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education* (2002), *available at* http://www.usccr.gov.

[87] Marin & Lee, *supra* note 86, at 22-23.

[88] Koretz, et al., *supra* note 73, at 25; *see also* Saul Geiser, *Redefining UC's Eligibility Pool to Include a Percentage of Students from Each High School* (1998) (University of California simulation finding limited changes in minority

models focusing on Texas found that the impact of a 10% rule on African American and Latino admissions was a marginal increase at one school, the University of Texas at Austin, and no increases at the other state universities.[89] Indeed, the 10% rule often had the effect of decreasing minority admissions in the model; for example, at Angelo State University, African American admissions dropped by 4.6% and Latino admissions dropped by 6.7%.

As noted above, minority admissions at the most selective institutions in Texas and California remain well below the levels attained through race-conscious admissions policies, even with the introduction of percent plans in those states. More specific analyses of admissions and enrollment data related to percent plans in Texas and California, as well as Florida, indicate that percent plans have had negligible effects on increasing the enrollment of racial minority students. Analyzing census data, applications data, admissions data, and enrollment data from the three states over several years, one leading study concludes: "[T]he gap between the college freshman age population, by race, and the applications, admissions, and enrollments to the states' university systems and to their premier campuses is substantial and has grown even as the states have become more diverse."[90] The study further concludes: "[D]ata, albeit scarce in the case of California and Florida, suggest that percent plans have fallen well short of creating the diverse flagship campuses reflective of the states they are intended to serve."[91]

C. Law School Admissions, "Critical Mass" and Problems of Tokenism

The plaintiffs in the University of Michigan Law School case have argued that the Law School's goal of seeking a "critical mass" of minority students amounts to a quota, or, in the alternative, that the definition of "critical mass" is too amorphous. Law school officials have denied that "critical mass" is a pretext for a quota, and the district court's analysis of recent law school data on the enrollments of underrepresented minorities suggests that "critical mass" is not functioning as quota: as the district court below found, minority enrollments ranged from a low of 5.4% in 1998 to a high of 19.2% in 1994.[92]

Recent research studies also provide some insights into the issue of defining "critical mass." As one study of college faculty indicates, critical mass focuses on "the need for

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admissions under 4% plan), *available at* http://www.ucop.edu/sas/research/researchandplanning/welcome.html. Models suggest that in order to have an appreciable effect on minority admissions, the plans must allow a much higher percentage of high school graduates to gain automatic admission. The Koretz, et al., study focusing on the University of California found that an automatic admissions policy for the top 12.5% of graduates of each high school in California could lead to increases in the numbers of admitted minority students, but that lower percentages (4% or 6%) would not have an effect. Koretz, et al., *supra* note 73, at 24-26. Admitting such a high percentage of students in order to see gains in minority enrollment is unworkable, however, because of the limited number of spaces available in the UC system.

[89] Horn, *supra* note 74, at 159-60.

[90] Horn & Flores, *supra* note 77, at 41.

[91] Horn & Flores, *supra* note 77, at 42.

[92] *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 840 n.26 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (6th Cir.), *cert. granted*, 123 S. Ct. 617 (2002).

students to feel safe and comfortable," and serves as a counter to "the lack of safety or comfort felt when one finds oneself a 'solo' or 'minority of one.'"[93] In other words, critical mass implies: "Enough students to overcome the silencing effect of being isolated in the classroom by ethnicity/race/gender. Enough students to provide safety for expressing views."[94]

The Law School's consideration of "critical mass" in its admissions policy thus recognizes the harms that accrue from having only token numbers of minority students within its student body. The dangers of tokenism are well documented in the research literature and include problems of racial isolation, alienation, and stereotyping.[95] A recent study of University of Michigan Law School alumni specifically identifies tokenism as a likely cause of significant differences between the responses of Latino alumni and the responses of other alumni from the 1970s to the question of how strongly, in looking back at the law school classroom experience, they value being called on in class.[96] Only 14% of the Latino alumni gave a response of 5 or above on a scale of 1 to 7 (where 1 was "none" and 7 was "a great deal"), compared to 44% of white alumni and 33% of black alumni; none of the Latinos gave a response of 7. The authors propose that because the law school's minority admissions program admitted only small numbers of Latino students during the 1970s, problems of tokenism and isolation lowered the value of the classroom experience for these students. As the authors state: "[B]eing part of a very small but visible minority can put tremendous burdens on students. They may regard themselves as 'tokens' and feel the quality of their answers have implications for how all their fellow [minority students] will be regarded."[97]

Researchers also suggest that when an institution such as the Law School has acted to admit a critical mass of minority students, it also strives to admit enough students to represent varied viewpoints and perspectives *within* underrepresented groups. Critical mass can promote the notion of *intra*-group diversity, which undermines the stereotype that all students within a group have identical experiences and possess identical viewpoints. As Professor Gurin has stated: "[T]he presence of more than a token number of minority students decreases the likelihood that those minority individuals will be stereotyped by others."[98] Studies thus suggest that "critical mass" is neither a rigid quota nor an amorphous

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[93] Gudeman, *supra* note 42, at 267-68.

[94] Gudeman, *supra* note 42, at 268.

[95] *See, e.g.*, Walter R. Allen, *The Color of Success: African-American College Student Outcomes at Predominantly White and Historically Black Public Colleges and Universities*, 62 Harv. Educ. Rev. 26 (1992); Chalsa M. Loo & Garry Rolison, *Alienation of Ethnic Minority Students at a Predominantly White University*, 57 J. Higher Educ. 58 (1986). *See generally* Sylvia Hurtado, et al., Enacting Diverse Learning Environments: Improving the Climate for Racial/Ethnic Diversity in Higher Education 25-27 (1999) (reviewing literature on psychological impacts of racial isolation in higher education); Rosabeth Moss Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*, 82 Am. J. Soc. 965 (1977) (describing the adverse effects of tokenism).

[96] Chambers, et al., *supra* note 40, at 411-12.

[97] Chambers, et al., *supra* note 40, at 412.

[98] Supplemental Expert Report of Patricia Y. Gurin, *Grutter v. Bollinger*, No. 97-75928 (E.D. Mich.) (Jan. 11, 2001), at 2.

concept defying definition. Instead, it is a benchmark that allows the Law School to exceed token numbers within its student body and to promote the exchange of ideas and views central to its mission.

Conclusion

The stakes in the University of Michigan cases are exceptionally high. Both public and private universities throughout the country will be affected by the decisions, and the legal and political landscape of race-conscious affirmative action will no doubt shift dramatically if the Court does not endorse its earlier *Bakke* decision. It is unlikely that the Court will go so far as to say that no government goals other than remedying the present effects of past discrimination can justify the use of race, but the middle ground between a full endorsement of *Bakke* and a complete disapproval of all non-remedial interests is broad. Even if the court decides to uphold all or part of the *Bakke* decision, it could still establish an interpretation of *Bakke* or a new set of legal requirements where the standards are so high that universities as a practical matter will be unable to meet them. While the legal doctrines in this area will remain murky until the Court issues its ruling—and may still be unclear even after its decision—the research literature demonstrating both the positive effects of diversity and the relative effectiveness of race-conscious admissions policies is clear. These research findings can and should inform the decision making on the basic constitutional questions before the Supreme Court.

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